

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint)
Against David Castle)
)

**SUMMARY OF FACTS
AND
STATEMENT OF FINDINGS**

Danny Smrdel filed a complaint alleging that David Castle violated Montana campaign finance and practices laws.

SUMMARY OF FACTS

1. David Castle was a candidate for Cascade County Sheriff in the November, 2006 election. His opponent in the election was the complainant, Danny Smrdel. Castle was the incumbent sheriff during the campaign and election. Castle prevailed in the election and currently serves as Cascade County Sheriff.

2. The complaint alleges that Castle and several other employees of the Cascade County Sheriff's Department (Sheriff's Department) violated §§ 2-2-121, 13-35-226, and 45-7-401, MCA. In a letter sent on September 18, 2006, the complainant was advised that based on jurisdictional considerations the investigation would be limited to determining whether Castle and others violated § 13-35-226, MCA.

3. § 13-35-226(4), MCA, prohibits a public employee from soliciting support for or opposition to the nomination or election of any person to public office while on the job or at the place of employment. The complaint alleges that the statute was violated when Castle and a group of Sheriff's Department employees participated in the filming of a campaign commercial for Castle in a city park in Great Falls.

4. On the same day that Smrdel filed his complaint with the office of the Commissioner of Political Practices, he also filed a complaint with the Cascade County Attorney's office, alleging the identical violations. Following an investigation the Cascade County Attorney, in a letter to Smrdel, stated the opinion that none of the statutes were violated.

5. Castle's campaign committee suggested a television commercial that would show that some of his deputies supported his candidacy. Castle approached an informal committee or association of off-duty Sheriff's Department deputies, detention officers, and other employees who met on Sundays, off county property. Castle stated that if possible he would like them to participate in the commercial. However, no Sheriff's Department employee was directed or required to participate in the commercial. Castle emphasized that if they chose to participate they could not be on county time when they did so, and could not use county resources, including county vehicles. Castle also told the employees that they would have to either be off shift or use compensatory time or vacation time while participating in the filming of the commercial.

6. Castle stated that approximately one-half of the employees participated in filming the commercial. Many of those who did not participate were on duty when the commercial was filmed. Castle stated that to his knowledge none of the employees was "on the clock" or working when they participated in filming the commercial.

7. Castle had a concern about whether it was appropriate for him and the employees to wear their uniforms during the filming of the commercial. He telephoned the Attorney General's office and spoke with Assistant Attorney General Pam Bucy. Bucy referenced an Attorney General's opinion that holds that a uniform is just an "accouterment" of a public employee or officer's position. Following the telephone conversation Bucy faxed a copy of the Attorney General's opinion to Castle.

8. The commercial was filmed beginning at 9 a.m. on Thursday, April 27, 2006, in a city park in Great Falls. Castle and the employees who appeared in the commercial traveled to the park in their personal vehicles. All of them wore their Sheriff's Department uniforms.

9. Detention officer Corporal Steve Archuleta was scheduled to work on April 27, 2006 beginning at 9 a.m. Archuleta asked his supervisor, Lieutenant Roger Handa, whether he could take a few hours of personal time off in the morning to participate in the commercial. Archuleta recalls that Handa approved the request. Archuleta took the time off and took part in the commercial. He went into work later that morning and worked a full eight hour shift.

10. According to Archuleta, Lieutenant Handa approved his request for time off, but instructed him to fill in his time card as if he had worked his regular shift. Archuleta's time sheet for April 27, 2006 reflects that he worked from 9 a.m. to 6 p.m., with a lunch hour between 1 and 2 p.m.

11. On April 27, 2006 Archuleta filled in his time card based on the standard and customary practice that had been followed for a number of years in the Sheriff's Department. Fair Labor Standards Act (FLSA) exempt employees like Archuleta were entitled to use "flex time" by working different hours than their normal shift, if approved beforehand by their supervisor. It was customary, however, for the employee who used flex time to complete his or her time card indicating that they worked their normal shift hours.

12. Lieutenant Handa was Archuleta's supervisor. Although Handa stated he did not specifically remember approving the use of flex time by Archuleta on April 27, 2006, he said that Archuleta was typically very conscientious about obtaining prior approval for the use of flex time.

13. Undersheriff Clyde "Blue" Corneliusen participated in the filming of the commercial. He filled in his time card indicating he worked from 7 to 11 a.m. and noon to 4 p.m. on April 27, 2006.

However, like Archuleta, Corneliusen “flexed” his time that day, taking break time during the commercial shoot and taking a different lunch hour than normal. Although he worked his full eight-hour shift, he actually worked different hours than those reflected on his time card. Corneliusen is a non-covered employee for purposes of FLSA, and is therefore not required to fill out a time card. While Corneliusen no longer fills out time cards, at the time of the commercial shoot it was customary for him to complete a time card.

14. In addition to concluding that no statutes were violated, the letter described in Fact 4, written to Smrdel by the Cascade County Attorney’s office, also expressed the opinion that the use of uniforms in the commercial was appropriate under the Attorney General’s opinion.

STATEMENT OF FINDINGS

The complaint alleges that Castle and others violated § 13-35-226(4), MCA, which provides:

(4) A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment. However, subject to 2-2-121, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views.

The complaint specifically challenges the conduct of Sheriff Castle, Undersheriff Corneliusen, and Officer Archuleta. Corneliusen and Archuleta are “public employees” subject to the restrictions in the statute. While Montana’s campaign finance and practices statutes do not define the term “public employee” (see § 13-1-101, MCA), the Code of Ethics defines the term as including “any temporary or permanent employee of a local government.” § 2-2-102(7)(b), MCA.

A local government includes a county. § 2-2-102(4), MCA. Montana’s rules of statutory construction provide that when “the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” § 1-2-107, MCA. See also *Dep’t of Revenue v. Gallatin Outpatient Clinic*, 234 Mont. 425, 430, 763 P.2d 1128, 1131 (1988).

Although Corneliusen and Archuleta are public employees, Castle is not a “public employee” subject to the restrictions in § 13-35-226(4), MCA. Castle is, rather, an elected local government officer; therefore he is a “public officer” as defined in § 2-2-102(8), MCA. Montana’s Code of Ethics makes a clear distinction between public employees and public officers. See, e.g., the statement of purpose in § 2-2-101, MCA. Accordingly, § 13-35-226(4), MCA does not apply to Castle as an elected local government officer. See the Summary of Facts and Statement of Findings in *Matter of the Complaint Against Dennis Paxinos, Yellowstone County Attorney* at 12-13 (May 11, 2000).

Regardless whether Castle, Corneliusen, or Archuleta are public employees, the investigation disclosed no evidence that would support a finding that they acted in any manner that could be construed as a violation of the restrictions of § 13-35-226(4), MCA. Castle met informally with a group of off-duty Sheriff’s Department employees at a location that was not on county property, and requested but did not direct or require their participation in the filming of a campaign commercial. Castle stressed that those who chose to participate could not be on county time during the filming, and could not use county resources. (Fact 5). Although the time sheets submitted by Corneliusen and Archuleta appear to show that they were on duty during the commercial shoot, both officers offered credible and reasonable explanations for the time sheet entries. (Facts 9-13).

A casual observer might conclude that the wearing of uniforms by Sheriff’s Department personnel during the filming of the commercial is evidence that they were “on the job,” or that their use is otherwise prohibited.

Anticipating that this might become an issue, Castle contacted the Attorney General's Office prior to the commercial shoot to inquire about the propriety of this activity. Castle was referred to an Attorney General's opinion that states, in relevant part:

. . . as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.

. . . a sheriff would not be prohibited from wearing a uniform while campaigning for a political issue or candidate.

. . . a uniform is simply an accouterment of a public employee's or officer's position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs.

51 Op. Att'y Gen. No. 1 (2005). Although the Attorney General's opinion specifically construed § 2-2-121, MCA, which is referenced in § 13-35-226(4), MCA, the two statutes establish similar restrictions on certain partisan political activity, while recognizing public officers' and employees' First Amendment rights:

(3)(a) . . . a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue . . .

(3)(c) This subsection (3) is not intended to restrict the right of a public officer or employee to express personal political views.

§ 2-2-121, MCA.

The Attorney General's opinion recognizes that there is a delicate balance between public officers' and employees' right to free speech and the necessity of avoiding partisan political activity through the use of public time or resources.

Based on his conversation with a representative of the Attorney General's office, Castle reasonably concluded that it was appropriate for he and the Sheriff's Department employees to wear their uniforms during the commercial shoot. I find that the use of uniforms does not support a conclusion that they were "on the job" while participating in the filming of the commercial. And, there is no other evidence that Castle or any Sheriff's Department employee participated in the filming of the campaign commercial "while on the job or at the place of employment," in violation of § 13-35-226(4) , MCA.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that Sheriff Castle, Undersheriff Corneliusen, or Corporal Archuleta violated Montana campaign finance and practices laws.

Dated this 13th day of July, 2007.



Dennis Unsworth
Commissioner